MONTANA LEGISLATIVE HISTORY

Chapter 571 19 87

Bill H 592 S _____ Original bill & history ✓ C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	2-18	___C	Hearing Date(s)	3-18	___C
	2-19	___C		3-24	___C
	_____	___C		_____	___C
	_____	___C		_____	___C
Date Out	2-19	___C	DATE OUT	3-24	

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

3/23	TRANSMITTED TO GOVERNOR		
3/27	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 252 EFFECTIVE DATE: 7/01/87		

HB 592 INTRODUCED BY HARP
ABOLISH BAD FAITH AND BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING ACTIONS

2/04	INTRODUCED		
2/04	REFERRED TO JUDICIARY		
2/18	HEARING		
2/19	COMMITTEE REPORT--BILL PASSED AS AMENDED		
2/21	2ND READING PASSED	49	48
2/23	3RD READING PASSED	50	49
	TRANSMITTED TO SENATE		
3/02	REFERRED TO JUDICIARY		
3/18	HEARING		
3/26	COMMITTEE REPORT--BILL CONCURRED AS AMENDED		
3/30	2ND READING CONCURRED	50	0
3/30	3RD READING CONCURRED	48	2
	RETURNED TO HOUSE WITH AMENDMENTS		
4/10	2ND READING AMENDMENTS CONCURRED	78	8
4/11	3RD READING AMENDMENTS CONCURRED	85	6
4/14	SIGNED BY SPEAKER		
4/15	SIGNED BY PRESIDENT		
4/15	TRANSMITTED TO GOVERNOR		
4/20	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 571 EFFECTIVE DATE: 7/01/87		

HB 593 INTRODUCED BY BROWN, J., ET AL.
PRIVATE ENTERPRISE ACT; ESTABLISHING A REVIEW COMMISSION

2/04	INTRODUCED		
2/04	REFERRED TO BUSINESS & LABOR		
2/05	FISCAL NOTE REQUESTED		
2/09	HEARING		
2/10	FISCAL NOTE RECEIVED		
2/16	COMMITTEE REPORT--BILL PASSED AS AMENDED		
2/16	REREFERRED TO APPROPRIATIONS		
3/21	HEARING		
3/26	REVISED FISCAL NOTE REQUESTED		
3/31	COMMITTEE REPORT--BILL PASSED AS AMENDED		
4/01	REVISED FISCAL NOTE RECEIVED		
4/01	2ND READING PASSED	72	22
4/01	3RD READING PASSED	73	22
	TRANSMITTED TO SENATE		
4/03	REFERRED TO FINANCE & CLAIMS		
4/08	HEARING		
4/14	ADVERSE COMMITTEE REPORT ADOPTED	46	0
4/15	RETURNED TO HOUSE NOT CONCURRED		

HB 594 INTRODUCED BY HARRINGTON, ET AL.
MONTANA MOTOR FUEL MARKETING ACT

2/04	INTRODUCED		
2/04	REFERRED TO BUSINESS & LABOR		
2/16	HEARING		
2/16	TABLED IN COMMITTEE		

orm CS-32
ev. 1985

STATUS SHEET

50th LEGISLATIVE SESSION

JUDICIARY COMMITTEE

HOUSE BILL NUMBER	ENTERED COM. DATE	DATE CON-SIDERED	OUT OF COM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMENDED DATE	DO NOT PASS AS AMENDED DATE	BE CON-CURRED IN DATE	BE NOT CON-CURRED IN DATE	BE CON-CURRED IN AMENDED DATE	BE NOT CONCURRE IN AS AMENDED DATE
577	2/17/87	2/17/87				2/20/87					
590		2/16/87	2/16/87	2/16/87							
592		2/18/87				2/19/87					
598		2/13/87	2/16/87	2/16/87							
602		2/19/87	2/23/87	tabled							
604		2/18/87	2/23/87	tabled							
605		2/16/87	2/17/87			2/17/87					
610		2/17/87	2/20/87	2/20/87							
632		2/19/87	2/23/87	tabled							
633		2/17/87				2/23/87					
636		2/17/87	2/20/87	tabled							
655		2/16/87	2/16/87	tabled							
662		2/17/87	2/18/87	tabled							
664		2/16/87	2/16/87	2/16/87							

Use a separate sheet for Senate Bills, House Bills, and Resolutions.

HOUSE BILL NO. 592

INTRODUCED BY HARP

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT COMMON-LAW CAUSES OF ACTION FOR BAD FAITH AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING EXIST ONLY WHEN EXPRESSLY PROVIDED BY STATUTE; AND PROVIDING AN APPLICABILITY DATE AND AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the existing law of contracts provides a legal remedy for the recovery of damages resulting from a breach of contract; and

WHEREAS, the Uniform Commercial Code governs commercial transactions, including those involving financial institutions, and requires that parties to a contract deal with one another in "good faith"; and

WHEREAS, the provisions of Title 33, chapter 8, relating to insurance unfair claims settlement practices, establish standards of good faith and fair dealing between insurance carriers and their insureds; and

WHEREAS, the Legislature has the opportunity to provide standards to govern other legal relationships, such as the employment relationship; and

WHEREAS, the Montana Supreme Court has held that a covenant of good faith and fair dealing is implied in every contract and is violated when a party's actions are arbitrary or capricious or violate the reasonable expectations of the other party; and

WHEREAS, no clear standards exist to guide the actions and decisions of a party to a commercial contract, yet violation of the implied covenant may subject a party to compensatory and punitive damages; and

WHEREAS, this newly created doctrine has introduced tremendous uncertainty and unpredictability into commercial relationships; and

WHEREAS, this uncertainty and unpredictability frustrates parties who might otherwise enter mutually beneficial commercial transactions; and

WHEREAS, this uncertainty and unpredictability has resulted in extensive litigation at substantial cost; and

WHEREAS, it is the opinion of the Legislature that clearly articulated standards, certainty, and predictability must be restored to the law of contracts; and

WHEREAS, certainty and predictability will be restored if the traditional law of contracts, consisting of longstanding statutes and judicially created doctrines, is substituted for the vagaries of the implied covenant of good faith and fair dealing.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

LC 0952/01

INTRODUCED BILL
HB-592

Section 1. Cause of action for bad faith or breach of implied covenant of good faith and fair dealing -- when allowed. Common-law civil causes of action for the torts of "bad faith" and "breach of the implied covenant of good faith and fair dealing" are permitted only when expressly authorized by statute.

Section 2. Applicability. This act applies to causes of action arising after the effective date of this act.

Section 3. Effective date. This act is effective on passage and approval.

-End-

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 18, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on February 18, 1987, at 7:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Eudaily who was excused.

EXECUTIVE SESSION:

ACTION ON HOUSE BILL NO. 393:

Rep. Gould moved that HB 393 DO PASS. Rep. Gould moved amendments. Question was called and a voice vote was taken. The motion CARRIED 13-1, with Rep. Hannah dissenting. Rep. Mercer stated that the 180 days should be stricken because the Supreme Court says that Human Rights Commission will have 12 months. Rep. Gould moved the insertion of 12 months. Question was called and a voice vote was taken. The motion CARRIED 12-2 with Reps. Giacometto and Hannah dissenting. (See Amendments Attached). Rep. Gould moved that HB 393 DO PASS as amended. Question was called and a voice vote was taken. The motion CARRIED 13-1 with Rep. Hannah dissenting. HB 393 DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 448:

Rep. Darko moved that HB 448 be tabled. Question was called and a voice vote was taken. The motion CARRIED unanimously. HB 448 TABLED.

ACTION ON HOUSE BILL NO. 470:

Rep. Miles moved that HB 470 DO PASS. Rep. Miles stated that there is a drafting error on page 26 of the bill and moved to amend it by inserting "except traffic records". Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Rapp-Svrcek moved to amend by returning to the original language of the bill on line 10. Question was called and a voice vote was taken. The motion CARRIED 8-7. (See Amendments Attached). Rep. Addy moved to amend the bill by returning to the original language on lines 3-6, page 13. Question was called and a voice vote was taken. The motion CARRIED 12-4. Rep. Miles moved that HB 470 DO PASS AS AMENDED. Question was called and a voice

Chairman Lory closed Executive Session.

HOUSE BILL NO. 592, Rep. Harp, District No. 7, sponsor, stated that this bill deals with bad faith. Contract decisions now imply a covenant of good faith and fair dealings in every contract. Montana is one of only three states with this new doctrine. The bad faith doctrine is a tort doctrine where parties to a contract used to be subject to contract damages for breach of contract and now they are subject to tort damages, punitive damages awards, and emotional distress awards. The contract means what it says only if the jury agrees with it and he asked why we need bad faith. He acknowledged that bad faith is not needed because as it exists right now it is damaging to Montana's small businesses, financial institutions, farms and ranches. He pointed out that when specific standards are needed the Legislature can write them into law. We do not need juries writing laws on a case by case basis, he said.

PROPONENTS:

JIM ROBISCHON, Montana Liability Coalition, stated that the implied covenant of good faith and fair dealing is a recent creation of the Supreme Court of California. The purpose of which is to provide access to the wonderful world of torts for a party to a commercial transaction. The world of torts includes the opportunity for damages from emotional distress and punitive damages. He pointed out that the purpose of HB 592 is to restrict this access from the commercial transaction to the tort system to only those situations that are covered by specific statutory applications. He submitted a handout titled, Bank Bad Faith Survey. (Exhibit A)

DAVID CALAHAN, First Interstate Bank, President, Missoula, stated that he supports this legislation for two reasons: 1.) The present state of affairs of the bad faith situation prevents myself and my officers from dealing with my existing customer base as well as my new customers because of the amount of time that is necessary to deal with a bad faith issue. 2.) The high cost involved in defense of a bad faith law suit has restricted the lending practices of my bank and we are much more conservative in making loans. He pointed out that when the bank does not do well they become much more restrictive in their lending practices.

BILL PARKER, Chief Executive Officer for the First Interstate Bank of Great Falls, stated that the primary function of a bank is lending money. He urged support for this bill so that banks can continue to make loans for businesses in Montana.

JOHN R. CRONHOLM, District Director for Small Business Administration in Helena, explained that the Government cannot be sued in bad faith, nor can Government employees, acting within the scope of their employment, be held liable for tortious conduct. Nonetheless, our office is under almost continuous subpoena to provide file information and testimony at bad faith hearings and trials. He stated that the possibility of litigative loss is a factor, not the only factor, but definitely a factor in this conservatism. He submitted written testimony. (Exhibit B)

PHILLIP B. JOHNSON, Montana Bankers Association, Director, supplied a definition for the drying up of risk capital that would normally provide additional employment in the state of Montana. Business loans that include financial leverage result in a higher degree of risk taking by both the borrower and the lender. While borrowers may be willing to take the leverage risk the lending institutions are not willing. This is not providing the capital for the building of Montana's economy. He urged support for this bill. Written Testimony was submitted by Mr. Johnson. (Exhibit C).

KAY FOSTER, appearing on behalf of the Governor's Council on Economic Development and the Billings Chamber of Commerce, presented written testimony in support of this legislation. (Exhibit D). She stated that the goal of the Governor's Council was to present administrative and legislative action that would encourage economic growth for all doing business in Montana. The passage of HB 592 is an important step toward that goal through the restoration of some certainty and predictability to employers, lenders and insurers in our state.

LORNA FRANK, Montana Farm Bureau, went on record in support of this bill.

CHIP ERDMANN, Montana League of Savings Institutions, stated that they support this legislation.

BOB PYFER, Montana Credit Unions League, went on record in support of the bill.

KEITH L. COLBO, Department of Commerce, testified in support of this bill from the standpoint of economic development in the state of Montana and they are very concerned over this issue.

OPPONENTS:

TOM LEWIS, Attorney, Great Falls, and the President of the Montana Trial Lawyers Association, appeared in opposition to the bill on behalf of the Association and many small

businesses. He stated that HB 592 violates the public interest by promoting rather than curbing abusive and unethical business practices. The bill mistakes the law relating to common law causes of action for breach of the implied covenant of good faith and fair dealing in that it suggest that all contract breaches are actionable in tort for bad faith. He further stated that this bill does not promote the legitimate business interests of the State of Montana; it promotes and protects improper and unethical business practices in violation of the interests of all citizens of this state. He submitted written testimony. (Exhibit E).

TERRY MURPHY, Montana Farmers Union and Grange, stated that he opposes taking away "bad faith" as a cause of action and submitted a witness statement. (Exhibit F).

CLIFF EDWARDS, Billings, Attorney and on the Board of Directors for a bank in Denton, stated that he is appearing on behalf of himself and Mr. Ed Swanson, County Commissioner from Glasgow. He stated that this bill sweeps out Montana's small businesses right to have hope to deal with the giant out-of-state corporations on an equal footing. He pointed out that this bill is way too broad and will be detrimental to Montana's businesses.

MARY WESTWOOD, Attorney from Great Falls, opposed the whole bill.

EDWIN V. SWANSON, Glasgow, opposed this bill.

KAY NORENBERG, Women Involved in Farm Economics, went on record in opposition to this bill.

GEORGE ALLEN, Montana Retail Association, opposed this legislation.

PROPONENTS:

ROGER W. YOUNG, President, Great Falls, Chamber of Commerce, sent in testimony in support of HB 592. (Exhibit G).

QUESTIONS (or Discussion) ON HOUSE BILL NO. 592:

Rep. Addy asked Mr. Hoyt why he is opposed to the whole bill. He stated that the banks and lending institutions need some relief but the bill itself is just too broad. He pointed out that the bill needs to be carefully structured so that it accomplishes what the proponents really want to accomplish and not create problems.

Rep. Addy asked Mr. Calahan why the banks should not be required to treat customers in good faith. He stated that they do treat their customers in good faith no matter what the transaction is and we attempt to do so in every event. The threat of damages is what creates the problems.

Rep. Cobb asked Mr. Johnson how much more risk capital will we get in this state by passing this bill. Mr. Johnson said that he really cannot answer that question. In dealing with business and leverage positions, with certain businesses, the price to the borrower increases and interest rates are a reflection of risk.

Rep. Miles stated that the way she reads this bill, there is no cause of action for breach of the covenant of good faith, unless it is expressed in statute. She stated that, since there is no accompanying legislation to define what would constitute bad faith for lending institutions, basically this tells her that this proposal would make them completely immune from any concept of bad faith or unfair dealings and she asked Rep. Harp to comment on this. He stated that that is not his intent. This bill states that in the future the Legislature will set the standards as far as bad faith is concerned.

Rep. Addy stated that under the Uniform Commercial Code it states that every contractor duty within this Code imposes an obligation of good faith in its performance and enforcement. He asked Mr. Lewis what the difference was between this obligation of good faith and what this bill is talking about. Mr. Lewis said that he does not see how this bill helps the banks. If the bill is aimed at remedies, the UCC specifically states that punitive damages are available if they are provided for in some other statute. He explained that punitive damages would still be available with this bill against the bank but they would be decided by a judge because this bill recognizes the duty of good faith and fair dealings under the UCC.

Rep. Harp closed the hearing on HB 592 by stating that we often use the big corporations as the whipping tool and there are small banks in Montana that are suffering because of judgments and uncertainty of the commerce and how the economy will move forward. This bill only asks for predictability in those judgments and to make sure those lending institutions continue to lend to businesses in Montana. He urged support for this bill.

HOUSE BILL NO. 604, Rep. Hannah, District No. 86, sponsor, stated that this bill defines life-sustenance procedure in the Living Will Act to exclude the provision of nutrition or hydration and therapy limiting the types of life-sustenance

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 18, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)			✓
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

Survey administered to Senior Bank Management Conference, Montana Banke Association, 2/12/87 - 38 Responde

EXHIBIT A
DATE 2-18-87
HB #592

BANK BAD FAITH SURVEY

A. Are you generally familiar with the area of bad faith claims against banks in Montana?

1. 38 yes
2. 0 no

If your answer to question A was yes, proceed to the following questions.

B. To what degree has your bank's exposure to bad faith claims affected the following lending activities:

1. The making of new commercial and agricultural loans?
   a. 13 substantial effect
   b. 23 some effect
   c. 2 no effect
2. The increase or reduction in the credit line extended to a specific agricultural or commercial loan customer?
   a. 10 substantial effect
   b. 23 some effect
   c. 5 no effect
3. The renewal or non-renewal of existing commercial and agricultural loans on maturity?
   a. 13 substantial effect
   b. 22 some effect
   c. 3 no effect
4. Liquidation of and foreclosure on existing commercial and agricultural loans?
   a. 20 substantial effect
   b. 14 some effect
   c. 4 no effect

EXHIBIT A
DATE 2-12-87
HB # 5921

C. It has been said that the "bad faith" doctrine has produced a virtual obligation on the part of Montana banks to accept a voluntary workout agreement in lieu of foreclosure.

What is your opinion of that statement?

1. 23 agree
2. 6 strongly agree
3. 4 don't know
4. 4 disagree
5. 1 strongly disagree

D. It has been said that the "bad faith" doctrine jeopardizes the quality of a Montana bank's loan portfolio.

What is your opinion of that statement?

1. 18 agree
2. 10 strongly agree
3. 7 don't know
4. 2 disagree
5. 1 strongly disagree

E. Many Montana bankers indicate that the "bad faith" doctrine has increased their costs for legal services, loan documentation and loan administration.

Is this statement true in your case?

1. 36 yes
2. 2 no

F. If your answer to question E was yes, characterize the nature of your cost increases caused by "bad faith."

1. 13 very substantial increase
2. 18 substantial increase
3. 3 moderate increase
4. 2 some increase

DATE 2-18-87
HB HB 592

Hello. My name is John Cronholm. I am the District Director of the Small Business Administration (SBA) in Helena, Montana. Our office guarantees loans submitted to us from banks all across the State of Montana. I am here to offer some observations about the effect of "bad faith" suits on the availability of commercial credit.

We rely heavily on our banking partners to provide basic loan servicing, but find that banks are becoming more and more reluctant to do anything more than accept payments and/or send out notices. When businesses come to the bank for "indepth" help, they are referred to an accountant or attorney as appropriate.

The Government cannot be sued in bad faith, nor can Government employees, acting within the scope of their employment, be held liable for tortious conduct. Nonetheless our office is under almost continuous subpoena to provide file information and testimony at bad faith hearings and trials.

During the month of January alone, my loan officers and I spent dozens of hours at depositions - all of which were attended by someone from my Legal Division - and provided file information for the case. The cost of reproducing the depositions and our file information for just this one lawsuit will exceed $1,000. The cost to the bank will vastly exceed ours.

One last point - during the twelve-month period ending 12/31/86 our office approved 426 loans. Three hundred sixty-three of these were to existing businesses and only sixty-four were to new businesses. Although this is the first year that we have tracked this data, I was surprised at how few loans were made to new businesses. I thought that historically that group comprised about 25% of our total activity. My people also tell me that about 60% of our loan funds are used for refinancing and the remainder for expansion and working capital. All of the above indicates to me that our lending partners - even with the added security of a Government guaranty - are directing their energy and resources to customers with whom they feel relatively secure and are not aggressively seeking new business.

It is my personal opinion that the possibility of litigative loss is a factor, not the only factor, but definitely a factor - in this conservatism.

That concludes my statment. If you have any questions I will try to answer them.

John R Cronholm
2-18-87

February 18, 1987

EXHIBIT C
DATE 2-18-87
HB # 592

Prepared Testimony - Proponant - House Bill 592

Phillip O Johnson, Director, Montana Bankers Assoc

Today, I'm providing you with a definition for the drying up of risk capital that would normally provide additional employment in the State of Montana.

Business loans that include financial leverage result in a higher degree of risk taking by both the borrower and the lender.

While borrowers may be willing to take the leveraged risk, the lending institution is not willing. The institution perceives itself at risk to a bad faith suit for allowing the borrower to willingly enter the contract.

This is not providing the capital for the building of business in Montana.

Please support HB592.

Thank you.

EXHIBIT D
DATE 2-18-87
HB # 5921

Billings Chamber of Commerce

February 18, 1987

TESTIMONY IN SUPPORT OF HB592

Mr. Chairman and Members of the Committee:

I am Kay Foster. I appear in support of HB592 on behalf of the Governor's Council on Economic Development as well as the Billings Area Chamber of Commerce.

In its report published in January of 1987 the Governor's Council made six specific recommendations in the area of tort reform legislation. The first of these was a request that "the Legislature address the issue of bad faith as it pertains to insurance claims, wrongful discharge and the lending policies of financial institutions."

The Council found that in all of these areas the current practice allows Montana juries a great deal of flexibility in making "bad faith" determinations and our codes must be revised to ensure a fair and equitable civil justice system for all Montanans.

The overall goal of the Governor's Council was to present administrative and legislative action that would encourage economic growth for all doing business in Montana. The passage of HB592 is an important step toward that goal through the restoration of some certainty and predictability to employers, lenders and insurers in our state. We urge its approval.

DATE 2-10-87
HB #592

A POSITION PAPER IN OPPOSITION TO
HOUSE BILL #592
by Tom L. Lewis

House Bill #592 violates the public interest by promoting rather than curbing abusive and unethical business practices. The Bill mistates the law relating to common law causes of action for breach of the implied convenant of good faith and fair dealing in that it suggests that all contract breaches are actionable in tort for bad faith. The Montana Supreme Court has specifically declined "to extend the breach of implied convenant to all contract breaches." Nicholas v. United Pacific Insurance Co., 42 St.Rptr. 1822. If the legislature were to enact HB592 the citizens of this state would be badly served by their elected representatives, because the act specifically encourages unethical and unreasonable business conduct.

The Montana Supreme Court has held that the bad faith breach of contract is actionable only when there is a "special relationship" that exists between the parties to a contract or when there is a knowing and unreasonable breach of the contract that exceeds the justifiable expectations of the injured party. The Court has properly reserved the application of tort damages into those cases where the conduct of the breaching party is especially harsh, unjustifiable, capricious and beyond all reasonable expectations of the injured party. The Court has primarily limited the application and availability of this common law cause of action to those cases where there is a special relationship between the parties arising out of an inherently unequal bargaining position at the time of both formation of the contract and enforcement of contract provisions.

The Court has found an implied convenant of good faith in adhesion contracts where one party to the contract is in a vastly inferior bargaining position at the time of formation of the contract. In those cases where powerful financial institutions are in a position to dictate to parties with whom such institutions contract (e.g. contracts between bank/customer, security broker/client, surety/principle, insurer/insured), the inferior party has no real say in the language of the written contract and often does not even see the contract until after the commercial relationship has come into existence. The public interest is therefore well served by a requirement of good faith and fair dealing actionable in tort, when the party in a superior position acts with particular harshness and unreasonableness concerning of the other party's rights arising from the commercial transaction, the insurance policy, or other contractual relationship existing between the parties.

EXHIBIT E
DATE 2-18-87
HB #592

In these kinds of legal relationships, common law actions for bad faith well serve the public, because that is the only way to take the profitability out of intentional and unreasonable contract breaches by parties in a superior financial or bargaining position. For example, if an insurer intentionally, arbitrarily and unreasonably withheld health insurance benefits from its insured and forced that insured into bankruptcy or other form of economic distress due to refusal to pay for extraordinary medical expense, HB592 would prevent the insured from ever being made whole. All the insurance company would be required to pay at the conclusion of a long court fight would be what the insurer should have paid to begin with. What incentive would there by for any insurer to deal fairly and in good faith with the insured, when all the insurer would ever have to pay would be what the insurer should have paid before the insured sought counsel and incurred substantial legal fees. What if the insured lost home, property and life savings, because he or she were unreasonably denied coverage by the carrier? Would the public policy and public interest of the citizens of this state be served by this bill which would allow the insurer to escape any liability for consequential damages resulting to the insured and his or loved ones?

The Montana Supreme Court has correctly ruled that in contracts involving inherently unequal bargaining positions and in cases of special relationship between the parties to a commercial transaction, there is an implied-in-law duty of good faith and fair dealing actionable in our civil courts. Every member of the legislature should read the well reasoned decisions of the Supreme Court, which clearly justify this legal principle. The legal relationships where this duty has been found include: Insurer/insured (First Security Bank v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979); Gibson v. Western First Ins., 682 P.2d 725, 41 St.Rptr. 1048 (1984); Lipinski v. Title Ins. Co., 655 P.2d 970 (1982). Bank/customer (First National Bank of Libby v. Twombly 689 P.2d 1226 (Mont. 1984); Tribby v. Northwestern Bank of Great Falls, 704 P.2d 409 (Mont. 1985). Attorney/client (Morse v. Espeland, 696 P.2d 428 (Mont. 1985).

House Bill 592 would be a giant and unfortunate step backward by the law makers of this State. The Supreme Court has proceeded cautiously and has only approved or upheld verdicts based upon bad faith when such verdicts or judgments are well founded by the evidence. If justice is to be sacrificed for certainty and predictability, then the

EXHIBIT E
DATE 2-16-87
HB # 592

citizens of this State will suffer. Powerful contracting parties and powerful litigants will therefore be permitted to intentionally violate their contractual obligations regardless of the harshness of the result on the weaker party to the contract. There will be no incentive for the out-of-state holding companies and financial giants to deal fairly with smaller Montana business interests, because the stronger party will only have to pay when it is caught and it will only have to pay what it should have paid according to the limitations the stronger party has written into the contract. The true damages of the victim of bad faith will not even be presented to a court and will go forever uncompensated. There will therefore be a strong and potentially irresistable incentive for powerful institutions to disregard their contractual/commercial obligations, because it will be less expensive and more profitable to violate the terms of the commercial relationship regardless of how disasterous the consequences are for the disadvantaged party.

HB592 does not promote the legitmate business interests of the State of Montana; it promotes and protects improper and unethical business practices in violation of the interests of all citizens of this State.

EXHIBIT F
DATE 2-18-87
HB #592

WITNESS STATEMENT

NAME Larry Murphy BILL NO. 592

ADDRESS Box 2447 Great Falls, MT 59403 DATE 2-18-87

WHOM DO YOU REPRESENT? MT. Farmers Union + MT. State Bankers

SUPPORT _____ OPPOSE ✓ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

We oppose taking away "bad faith" as a cause of action.

We do believe in limiting punitive damages, even in bad faith cases, but certainly do not want to lose the right to access in such cases.

EXHIBIT G
DATE 2-18-87
HB # 592

GREAT FALLS AREA CHAMBER OF COMMERCE
P.O. BOX 2127
926 CENTRAL AVENUE
GREAT FALLS, MONTANA 59403
(406) 761-4434

February 18, 1987

TO: House Judiciary Committee
Cascade County Legislative Delegation

FROM: Roger W. Young, President

SUBJECT: BAD FAITH/GOOD FAITH AND FAIR DEALING TORT REFORM

As it has with other tort reform legislation supported by the Montana Liability Coalition, the Great Falls Area Chamber of Commerce favors passage of HB-592 (Harp) which would reform the tort of bad faith and the covenant of good faith and fair dealing. This legislation does much to clarify and limit the bad faith/good faith tort and covenants. It is the position of the Great Falls Area Chamber of Commerce that apart from simply being a tort especially important to the banking community, those of us who have been involved with local economic development activities have developed a new appreciation for it.

For example, the Economic Growth Council of Great Falls, much heralded at its inception for its innovation and aggressiveness in providing risk capital, revolving loan, and technical assistance to new and expanding business, is out of business today. The organization was forced to shut its doors last year largely because a law suit brought against it which alleges bad faith on the part of the Growth Council. A second law suit was filed recently by another client. Both were provided significant levels of assistance by the EGC but when the EGC placed a limit on the level of its support and withdrew its assistance, they apparently became guilty of "bad faith and unfair dealing". The lesson to be learned apparently is that if a local economic development corporation sticks its neck out and offers financial assistance, it better be prepared to go all the way and not turn back for fear of similar reprisals. Obviously this will have a very chilling effect on local efforts to provide much needed risk and venture capital; something which many argue is crucial to economic development in our state.

It is the concept of good faith and fair dealing as well as fear of allegations of bad faith, that has caused every business decision to require endless paper work and documentation in all business, government and institutions. Today the gentleman's agreement and handshake contracts appear to be gone forever.

MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 19, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on February 19, 1987, at 7:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Eudaily who was excused.

EXECUTIVE SESSION:

ACTION ON HOUSE BILL NO. 316:

Rep. Gould moved that HB 316 DO PASS. He moved that a sunset be put on the bill and that a report be presented to the next Legislature. Question was called on the amendment to provide a sunset for the involuntary commitment statute. A voice vote was taken and the motion CARRIED unanimously. Rep. Gould moved that HB 316 DO PASS AS AMENDED. Mr. MacMaster stated that an extension of authority needs to be put on the bill. He pointed out that this is needed because 53-21-106 grants rulemaking authority and Section 102 is amended so the authority needs to be extended to Section 102 as amended. Rep. Gould moved the amendment. Question was called and a voice vote was taken. The motion CARRIED 13-2 with Reps. Hannah and Daily dissenting. Rep. Addy stated that the fiscal note is incorrect with regard to the definition of "mentally ill". He moved to amend page 5, lines 10-15, striking the words "no person". Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Gould moved DO PASS AS AMENDED. Question was called and voice vote was taken. The motion CARRIED unanimously. HB 316 DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 284:

Rep. Darko moved that HB 284 DO PASS. She stated that HB 283 without HB 284 is nothing more than mere language. She moved amendments that ask for the penalties to be softened down to the minimum amount because we have to keep aggravated visitation interference as a felony in order to extradite people from another state. Question was called and voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Darko moved that HB 284 DO PASS AS AMENDED. Rep. Addy moved to amend HB 284 on page 2, line 4 inserting "without the written consent of the custodial

(See Amendments Attached). Rep. Mercer moved that HB 167 DO PASS AS AMENDED. Rep. Addy stated that emotional distress should be available in contract actions where a breach is of a kind that is likely to cause serious emotional disturbance. He moved that emotional distress be allowed in contract actions. Rep. Giacometto pointed out that this amendment would open this up again and require the court to decide in every instance. Rep. Addy said that if the contract was breached, serious emotional distress could result and this must be opened up to some extent. Rep. Giacometto opposed the amendment. Rep. Meyers also opposed the amendment because it will water down the bill. He stated that 14 businessmen testified that they wanted the bill the way it was, and the subcommittee tried to meet a compromise, and with the proposed amendment it would be too watered down. Rep. Mercer pointed out that there should be some way of getting compensation for emotional distress damage but what concerns him is that putting in something where you say emotional disturbance is likely to result, just will not take a very creative court to say that there are cases of emotional disturbance. The bill as amended is clear standard and with the proposed language the clear standard will be eliminated. It is not worth risk to put Rep. Addy's amendment into this bill. Rep. Addy stated that it is worth the risk in many cases. Question was called on Rep. Addy's amendment. A voice vote was taken and the motion FAILED 7-9. Question was called on Rep. Mercer's, do pass as amended. A voice vote was taken and the motion CARRIED 9-6, with Reps. Rapp-Svrcek, Miles, Daily, Darko, Addy and Strizich dissenting. HB 167 DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 209:

Rep. Mercer moved that HB 209 DO NOT PASS. Rep. Daily moved a substitute motion to TABLE the bill. Question was called and a voice vote was taken. The motion CARRIED 8-7. HB 209 TABLED.

ACTION ON HOUSE BILL NO. 592:

Rep. Mercer moved that HB 592 DO PASS. He moved the amendments proposed by the subcommittee. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Mercer moved that HB 592 DO PASS AS AMENDED. Rep. Addy stated that with all the limits that have been proposed this session, this bill is simply overkill. Rep. Miles proposed that language be inserted dealing with the UCC and it might constitute statutory language but we should make it clear that the UCC is considered separate language, similar to the insurance bad faith. Rep. Mercer stated that this issue was discussed in the subcommittee and it was the feeling of the witnesses and the

subcommittee that Rep. Miles proposal is not necessary. Rep. Miles stated that this committee has taken a lot of time to spell out exactly what we mean on such issues and this should be made clear in the bill. Rep. Addy suggested language with regard to the UCC regulations. Rep. Mercer stated that he does not have an objection to that amendment but it should be broadened to say that the action brought under the UCC or the Montana Commercial Code as permitted by 33-18-201 be inserted.

Rep. Mercer moved that amendment. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached).

Rep. Addy moved that HB 592 DO PASS AS AMENDED. Question was called and a voice vote was taken. The motion CARRIED 14-1 with Rep. Miles dissenting. HB 592 DO PASS AS AMENDED.

ACTION ON HOUSE BILL NO. 740:

Rep. Cobb moved that HB 740 DO PASS. He moved the proposed amendments. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Cobb moved that HB 740 DO PASS AS AMENDED. Question was called and a voice vote was taken. The motion CARRIED unanimously. HB 740 DO PASS AS AMENDED.

ACTION ON HOUSE JOINT RESOLUTION NO. 21:

Rep. Mercer moved that HJR 21 DO PASS. Question was called and a voice vote was taken. The motion CARRIED 14-1, with Rep. Addy dissenting. HJR 21 DO PASS.

ACTION ON HOUSE BILL NO. 737:

Rep. Keller moved that HB 737 DO PASS. Question was called and a voice vote was taken. The motion CARRIED unanimously. HB 73 DO PASS.

ACTION ON HOUSE BILL NO. 240:

Rep. Mercer moved that HB 240 DO PASS. Rep. Mercer moved the amendments in their entirety and explained them. Question was called and a voice vote was taken. The motion CARRIED unanimously. Rep. Brown moved to amend on page 5, line 8. Reps. Miles and Mercer agreed with the amendment. Question was called and a voice vote was taken. The motion CARRIED unanimously. (See Amendments Attached). Rep. Mercer moved that HB 240 DO PASS AS AMENDED. Question was called and a voice vote was taken. The motion CARRIED 15-1. HB 240 DO PASS AS AMENDED.

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 19, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)			✓
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)	✓		
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

CS-30

STANDING COMMITTEE REPORT

FEBRUARY 19, 19 87

Mr. Speaker: We, the committee on JUDICIARY

report HOUSE BILL NO. 592

☒ do pass ☐ do not pass
☐ be concurred in ☐ be not concurred in
☒ as amended ☐ statement of intent attached

Chairman

1. Title, line 6.
Strike: "IMMEDIATE"

2. Page 3, line 6.
Following: "statute."
Insert: "Nothing in this section affects the rights of any person to bring an action as permitted by 33-16-201 or the Uniform Commercial Code."

3. Page 3, line 10.
Strike: "passage and approval"
Insert: "July 1, 1987"

AHB592a/JM/JM2

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CHAIRMAN--SEN. JOE MAZUREK
NORMAL SCHEDULE==> SITE: ROOM 325 DAYS: MON THRU FRI TIME: 10:00 A.M.

SECRETARY-MARY HUBER

BILL NO	REFER DATE	HEARING DATE	CONSIDERATION DATES	COMMITTEE ACTION	REREFERRED TO COMM	DATE OUT
HB0567	3/02	3/25		CONCUR AS AMENDED		3/27
RAMIREZ, JACK			REDUCTION OF TORT AWARD BY AMOUNT OF COLLATERAL SOURCE PAYMENTS			
HB0577	3/02	3/27		CONCUR		3/27
BROWN, DAVE			TRAINING REQUIREMENT FOR PROBATION OFFICERS			
HB0590	2/21	3/27		CONCUR		3/27
STRIZICH, BILL			EXTEND CRIME OF POSSESSION OF WEAPON BY PRISONER TO COUNTY AND CITY JAIL			
HB0592	3/02	3/18		CONCUR AS AMENDED		3/24
HARP, JOHN			ABOLISH BAD FAITH & BREACH OF COVENANT OF GOOD FAITH & FAIR DEALING ACTIONS			
HB0598	2/21	3/27		CONCUR		3/27
RAPP-SVRCEK, PAUL			RESISTANCE NOT NECESSARY TO SHOW LACK OF CONSENT TO SEXUAL OFFENSE			
HB0605	2/21	3/13		CONCUR		3/13
BROWN, JAN			DISCLOSURE OF CHILD ABUSE AND NEGLECT RECORDS			
HB0610	3/02	3/27		CONCUR AS AMENDED	Tabled 3/27	-
BROWN, DAVE			AUTHORIZE PAROLE AND PROBATION OFFICER TO CARRY FIREARMS AT CERTAIN TIMES			
HB0664	2/21	3/10		CONCUR		3/11
RAMIREZ, JACK			REVISE LAW ON JOINT OBLIGATIONS			
HB0670	3/02	3/27		CONCUR AS AMENDED		3/27
BACHINI, BOB			RAILROAD EMPLOYEE AS SPECIAL PEACE OFFICER			
HB0679	2/21	3/16		CONCUR AS AMENDED		3/19
KEENAN, NANCY			ALLOCATE DOMESTIC ABUSE FINES TO FUND BATTERED SPOUSES PROGRAM			
HB0696	3/02	3/20		TABLED	Tabled 3/27	-
HANNAH, TOM			DE NOVO REVIEW OF DECISIONS OF COMMISSION FOR HUMAN RIGHTS			

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 18, 1987

The forty-fifth meeting of the Senate Judiciary Committee was called to order on March 18, 1987 at 10:00 a.m. in Room 325 of the state Capitol, by the chairman, Senator Joe Mazurek.

ROLL CALL: All committee members were present.

CONSIDERATION OF HOUSE BILL 470: Representative Joan Miles, Helena, gave the committee a summary on House Bill 470. (Exhibit 1) She agreed with the McGrath amendments.

PROPONENTS: Senator Van Valkenburg, Missoula, supported the bill. He said it will establish a public policy that will help the youth of Montana. He said there is a real need for communication with the youth about the consequences they might face if convicted of a crime. He felt kids that commit adult crimes should be treated as adults.

Mike McGrath, Lewis and Clark County Attorney, went through the bill section by section. He said the bill will make the 16 year-old youth make his own decision when it comes to procedures, after being caught. He said Juvenile Court supports it. He gave the committee amendments to the bill to clear up some language problems. (Exhibit 2)

Patrick Paul, District Attorney for Cascade County, favored the bill.

OPPONENTS: There were none.

DISCUSSION ON HOUSE BILL 470: Senator Mazurek asked on page 26, about the confidentiality part, which a victim is prevented from finding out all the information about the convicted or charged youth.

Mr. McGrath said the law right now, will not let the court disclose to the victim who attacked him. Senator Mazurek asked if there is any prohibition in the bill against the victim going to the press with the name of a youth who committed the crime. Mr. McGrath said no, and would like to leave it that way because you can't restrain people like that. Senator Mazurek said it doesn't make sense to

of limitations in a medical case is three years, not five as stated in the amendments.

Roger Tippy, Montana Dental Association, supported the bill. (Exhibit 7)

Jim Robischon, Montana Liability Coalition, supported the bill without amendments.

OPPONENTS: There were none.

DISCUSSION ON HOUSE BILL 344: Senator Mazurek inquired if Mr. Neely had a problem with the Smith first amendment. Mr. Neely said yes. Senator Mazurek asked what Mr. Neely thought about the effective date in the Smith amendments. Mr. Neely said this is a more modified version on the effective date. Mr. Neely and Mr. Rossback said they don't like the amendment to section 2.

Senator Blaylock asked how long has it been in Montana's books that one can bring suit against someone 24 years down the road. Mr. Neely said for about 100 years. Senator Blaylock asked why the premiums are so high if the claims are low. Mr. Neely said Montana has had quite a few claims; he said it is more than 24, it is around 134 claims with only 56 hospitals. He said Montana has one of the highest insurance claims rate against doctors in the nation.

Representative Asay closed the hearing on HB 344.

CONSIDERATION OF HOUSE BILL 592: Representative Harp, House District 4, introduced HB 592 to the committee. (Exhibit 8)

PROPONENTS: Jim Robischon, Montana Liability Coalition, supported the bill with amendments and gave written testimony to the committee from the International Franchise Association. (Exhibit 9) He submitted his amendments, which he called the substitute bill for HB 592. (Exhibit 10) He also handed out a Bank Bad Faith Survey to the committee. (Exhibit 11)

John R. Cronholm, Small Business Administration, supported HB 592. (Exhibit 12)

William Parker, First Interstate Bank of Great Falls, supported the bill. (Exhibit 13)

Tim H. Gill, Montana Livestock Ag. Credit Inc., favored HB 592. (Exhibit 14)

Chip Erdman, Montana Savings and Loans, supported the introduced bill and the Montana Liability Coalition amendments.

Bob Pyfer, Credit Unions, supported the bill.

Senator Tveit of Senate District 11, favored the bill.

Stuart Doggett, Chamber of Commerce, supported HB 592.

Ed Landers, Chamber of Commerce, supported the bill.

Kay Foster, Governor's Council on Economic Development, supported HB 592. (Exhibit 15)

Riley Johnson, Montana Dental Assn., testified in support of HB 592.

Irv Dellinger, Montana Builders Assn. supported the bill.

John Cadby, Montana Bankers Association, supported the bill as amended.

OPPONENTS: George Allen, Executive Vice President, Montana Retail Association, opposed House Bill 592. (Exhibit 16)

Representative Kelly Addy, Billings, didn't like the bill because he felt the local banks will be sold more to out-of-state people.

Terry Murphy, Farmers Union, said the bill will not solve any problems at all.

Representative Gary Spaeth, Billings, opposed HB 592.

Joe Brunner, Montana Grange, opposed the bill. (Exhibit 17)

Cliff Edwards, a banker, said the bill will cut Montana business.

Mary Westwood, Montana Sulphur and Chemical Co. opposed the bill. (see witness sheet)

Charlotte White, WIFE, opposed the bill.

Representative Bruce Simon, Billings, explained his story of how his family lost their long surviving clothing store in Billings (Coles) to a bank that left the family business in a bind. He opposed the bill.

Millie Good, representing herself, opposed the bill.

Edward Reeve, representing himself, opposed the bill.

Joseph Moore, Montana People Action, opposed HB 592.

Robert Boucher, Conrad, opposed the bill. (Exhibit 18)

Tom L. Lewis, representing himself, opposed HB. 592. (Exhibit 18A)

Karl Englund, Montana Trial Lawyers Association, opposed the bill and the amendments. He said you don't have a bad faith case unless you breach a contract.

DISCUSSION ON HOUSE BILL 592: There was none.

ADJOURNMENT: The committee adjourned at 12:15 p.m.

SENATOR JOE MAZUREK, Chairman

mh

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date March 18

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

SENATE JUDICIARY
EXHIBIT NO. E
DATE March 18, 1987
BILL NO. HB 592

SUMMARY OF HB592 (HARP)
(Prepared by Senate Judiciary Committee staff)

HB592 provides that the common-law causes of action for bad faith and breach of the implied covenant of good faith and fair dealing exist only when expressly provided by statute. Under current law, there are judicially created causes of action for bad faith and breach of the implied covenant of good faith and fair dealing. These causes of action have been the basis of large awards in recent years in what traditionally have been contract type cases (limited to contract type remedies; i.e., not emotional damages or other types of tort, non-economic type damages). This bill is an attempt to prevent tort-type recoveries in contract-type cases [such as the Baskin Robbins case from Butte that was discussed before the Committee last week]. The bill would prohibit any such action unless it is expressly provided for in statute. The bill expressly does not prohibit insurance bad faith cases or such cases brought under the Uniform Commercial Code. The bill is effective on July 1, 1987, and applies to cause of action arising after that date.

COMMENTS: I am not aware of any statutes that provide for such remedies, except for the Insurance Code and the Uniform Commercial Code. This bill would prohibit such actions for wrongful discharge, among others.

C:\LANE\WP\SUMHB592.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE March 18, 1987
BILL NO. HB 592

STATEMENT OF THE
INTERNATIONAL FRANCHISE ASSOCIATION
ON MONTANA HOUSE BILL 592
BEFORE THE SENATE
COMMITTEE ON JUDICIARY
MARCH 18, 1987

The International Franchise ASsociation (IFA), a trade association based in Washington, D.C., supports the passage of House Bill 592. IFA represents more than 600 domestic and international franchisors and has served as a spokesman for franchising since 1960. The passage of Bill 592 would re-establish the positive climate for franchising which existed prior to the Montana Supreme Court's decision in Dunfee v. Baskin-Robbins.

Background on Franchising

Franchising has come to represent fully one-third of all retail sales in the United States economy, according to the United States Department of Commerce. Sales of goods and services through franchised businesses are expected to reach $591 billion in 1987 and account for the employment of an estimated 7 million people. Franchising is a method of business expansion being employed by approximately 2,300 franchisors nationally, and there are an estimated 500,000 franchised establishments. The most recent figures available indicate that in 1985 there were approximately 1,200 franchised businesses or franchisor-owned businesses in Montana - and this figure excludes automobile and petroleum dealerships. Two prominent franchisors -- Kampgrounds of American and Americlean Corporation -- which are members of IFA are based in Montana.

Franchising promotes the establishment of new small businesses and the creation of jobs. The success rate of businesses owned by franchisees is significantly better than the rate for other independently owned small businesses. Studies for the United States Small Business Administration have shown that almost one-third of business start-ups fail in their first year of operations and 65 percent within five years. In contrast, in 1985, less than five percent of franchisee-owned businesses ceased operation.

In summary, franchising is and should continue to be an important and growing part of Montana's economy.

The legislation before this committee -- House Bill 592 -- addresses a recent Montana Supreme Court decision which was widely interpreted as being severely damaging to the growth of franchising in the state. See: Dunfee v. Baskin-Robbins, Inc., 43 Montana 964, 720 P.2d 1148 (1986).

The Supreme Court's decision in Dunfee was widely reported and discussed in the franchising community and has already begun to have a chilling effect on franchising in Montana. Franchisors planning expansion in the state will likely expand elsewhere or will open company-owned stores, thus denying small business ownership opportunities to Montanans.

This legislation amended as proposed by the Montana Liability Coalition, would enact safeguard provisions which would protect companies involved in franchising from the severe damage of a judicial decision like that in Dunfee.

1) The bill would limit damages in cases involving a cause of action for breach of the implied covenant of good faith and fair dealing to the measure of contract damages, i.e., punitive damages could not be awarded. In the Dunfee case, the trial court awarded and the Supreme Court affirmed compensatory damages of $232,000 and punitive damages of $300,000.

2) Under the bill's provisions, an action for breach of an implied covenant of good faith and fair dealing arising from a contract may not be maintained against a party whose acts or omissions to act complained of are permitted by any provision of the contract or which constitute the exercise of a right granted by common law on statute. In the Dunfee case, the franchise was granted for a store in a specific location and the contract specified that Baskin-Robbins, the defendant company, had the right to approve or disapprove any proposal to relocate the franchise. Despite the specific contract provision allowing such disapproval, the court decided against the company because it refused to approve the franchisee's request to relocate the store.

3) The standard of conduct required under the implied covenant of good faith and fair dealing is drawn from the historical basis of the Uniform Commercial Code.

IFA strongly supports the enactment of this legislation in the belief that it will constitute a major step toward repairing the damage to Montana's economy which will ultimately result from the Dunfee decision.

IFA urges this committee to pass Substitute HB 592.

SENATE JUDICIARY
EXHIBIT NO. 9
DATE 3-18-87
BILL NO. H.B. 592

SENATE JUDICIARY
EXHIBIT NO. 10
DATE March 18, 1987
BILL NO. HB 592

SUBSTITUTE HB 592

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT, UNLESS OTHERWISE PROVIDED IN STATUTE, DAMAGES FOR BAD FAITH AND BREACH OR TORTIOUS VIOLATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARE LIMITED TO THE MEASURE OF CONTRACT DAMAGES; PROVIDING THAT A PARTY MAY NOT BE FOUND TO HAVE BREACHED THE COVENANT IF ITS ACTION WAS BASED UPON A STATUTORY OR CONTRACTUAL RIGHT; DEFINING GOOD FAITH CONDUCT; AND PROVIDING AN APPLICABILITY DATE AND AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA.

Section 1. Damages. Unless otherwise expressly provided by statute, damages for breach or tortious violation of an implied covenant of good faith and fair dealing shall be limited to the measure of damages for breach of contract.

Section 2. When covenant applicable. An action for breach or tortious violation of an implied covenant of good faith and fair dealing included within or arising out of a contract may not be maintained against a party whose act or failure to act is permitted by any provision of statute or of such contract.

Section 3. Definition. The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Section 4. Applicability. This act applies to causes of action arising after the effective date of this act.

Section 5. Effective date. This act is effective July 1, 1987.

Survey administered to Senior Bank Management Conference, Montana Banke: Association, 2/12/87 - 38 Respondent:

SENATE JUDICIARY
EXHIBIT NO. e 11
DATE March 18, 1987
BILL NO. HB 592

BANK BAD FAITH SURVEY

A. Are you generally familiar with the area of bad faith claims against banks in Montana?

1. 38 yes

2. 0 no

If your answer to question A was yes, proceed to the following questions.

B. To what degree has your bank's exposure to bad faith claims affected the following lending activities:

1. The making of new commercial and agricultural loans?

a. 13 substantial effect

b. 23 some effect

c. 2 no effect

2. The increase or reduction in the credit line extended to a specific agricultural or commercial loan customer?

a. 10 substantial effect

b. 23 some effect

c. 5 no effect

3. The renewal or non-renewal of existing commercial and agricultural loans on maturity?

a. 13 substantial effect

b. 22 some effect

c. 3 no effect

4. Liquidation of and foreclosure on existing commercial and agricultural loans?

a. 20 substantial effect

b. 14 some effect

c. 4 no effect

C. It has been said that the "bad faith" doctrine has produced a virtual obligation on the part of Montana banks to accept a voluntary workout agreement in lieu of foreclosure.

What is your opinion of that statement?

1. 23 agree
2. 6 strongly agree
3. 4 don't know
4. 4 disagree
5. 1 strongly disagree

D. It has been said that the "bad faith" doctrine jeopardizes the quality of a Montana bank's loan portfolio.

What is your opinion of that statement?

1. 18 agree
2. 10 strongly agree
3. 7 don't know
4. 2 disagree
5. 1 strongly disagree

E. Many Montana bankers indicate that the "bad faith" doctrine has increased their costs for legal services, loan documentation and loan administration.

Is this statement true in your case?

1. 36 yes
2. 2 no

F. If your answer to question E was yes, characterize the nature of your cost increases caused by "bad faith."

1. 13 very substantial increase
2. 18 substantial increase
3. 3 moderate increase
4. 2 some increase

SENATE JUDICIARY
EXHIBIT NO. 11
DATE 3-18-87

Hello. My name is John Cronholm. I am the District Director of the Small Business Administration (SBA) in Helena, Montana. Our office guarantees loans submitted to us from banks all across the State of Montana. I am here to offer some observations about the effect of "bad faith" suits on the availability of commercial credit.

We rely heavily on our banking partners to provide basic loan servicing, but find that banks are becoming more and more reluctant to do anything more than accept payments and/or send out notices. When businesses come to the bank for "indepth" help, they are referred to an accountant or attorney as appropriate.

The Government cannot be sued in bad faith, nor can Government employees, acting within the scope of their employment, be held liable for tortious conduct. Nonetheless our office is under almost continuous subpoena to provide file information and testimony at bad faith hearings and trials.

During the month of January alone, my loan officers and I spent dozens of hours at depositions - all of which were attended by someone from my Legal Division - and provided file information for the case. The cost of reproducing the depositions and our file information for just this one lawsuit will exceed $1,000. The cost to the bank will vastly exceed ours.

One last point - during the twelve-month period ending 12/31/86 our office approved 426 loans. Three hundred sixty-three of these were to existing businesses and only sixty-four were to new businesses. Although this is the first year that we have tracked this data, I was surprised at how few loans were made to new businesses. I thought that historically that group comprised about 25% of our total activity. My people also tell me that about 60% of our loan funds are used for refinancing and the remainder for expansion and working capital. All of the above indicates to me that our lending partners - even with the added security of a Government guaranty - are directing their energy and resources to customers with whom they feel relatively secure and are not aggressively seeking new business.

It is my personal opinion that the possibility of litigative loss is a factor, not the only factor, but definitely a factor - in this conservatism.

That concludes my statment. If you have any questions I will try to answer them.

John R Cronholm

2-18-87

SENATE JUDICIARY
EXHIBIT NO. 12
DATE March 18 1987
BILL NO. HB 592

SENATE JUDICIARY
EXHIBIT NO. 13
DATE March 18, 1987
BILL NO. HB 592

TESTIMONY OF WILLIAM C. PARKER ON HOUSE BILL 592, MARCH 18, 1987

Good Morning! My name is Bill Parker and I am president and chief executive officer of First Interstate Bank of Great Falls and I appreciate the opportunity to speak before you this morning. Our Bank is a wholly owned subsidiary of First Interstate Bancorp, the 8th largest banking company in the country, with headquarters in Los Angeles, California. I have been with First Interstate Bank of Great Falls for 10 years and have served in my present capacity for almost two years.

Only two of seven banks in Great Falls operated at a profit last year and ours was not one of them. The two that were profitable could only be considered marginally so. Banking in these deregulated times and in an ecomony such as we are experiencing in Montana, is tough enough but operating under the constant threat of bad-faith, makes it formidable.

Bankers, by our very nature, are in the business of assessing risk. That is the very essence of what extending credit is all about. Yet what most people don't understand is that banker's never share in the profits of any business they may finance. At best, we will get paid interest on any funds we loan out and after paying out interest to the depositors who provided the money in the first place, and then paying salaries and all of our other operating expenses, we are hopefully left with a small margin we can call profit. Since we can never experience extra-ordinary profits, we are not in a position to take extra-ordinary risks.

Bad faith is a risk that we simply cannot assess. A jury looks at bad faith like most of us look at good art work - we know it when we see it, but we can't define it. In our bank we have determined that since we don't know what it is we can only avoid those instances where we know it will most likely occur. Those instances are primarily start-up operations or marginal operations.

A common measure of a bank's loan activity is its loan-to-deposit ratio. The loan-to-deposit ratio in our bank is about 75% which is heavy by anyone's standards. Of our total loans, about 75% are directly related to business and agriculture. In fact, agriculture alone represents 25% of our total loan portfolio. But we are changing the thrust of our bank. That is not to say that we won't make business or ag loans, but it is to say that those areas are not at the heart of our calling efforts. We are instead gearing ourselves toward increased activity in the consumer loan area for a variety of reasons, not the least of which is that consumer's don't sue for bad faith.

Would we change our direction if this bill is passed? I certainly cannot stand before you this morning and say that absolutely we would. But I can say without hesitation, that if some relief isn't provided, that we will absolutely continue to avoid those areas where the risk of a lawsuit is highest, and that is dealing with new business start-ups, or business or agricultural operators who appear to be marginal.

We spend tremendous time and tremendous dollars, trying to be fair to our customers. I urge you to be fair to the banking industry with your support of House Bill 592.

SENATE JUDICIARY
EXHIBIT NO. 14
DATE March 18, 1987
BILL NO. HB592

WITNESS STATEMENT

NAME Tim H. Gill BILL NO. HB 592

ADDRESS Helena Montana DATE 3/18/87

WHOM DO YOU REPRESENT? Montana Livestock Ag. Credit Inc.

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

As President of Montana Livestock, I represent over 200 farmer & Rancher share holder owners. Although we have a very clean record historicly for avoiding litigation, We see the very real potential for just one adverse Bad faith award stripping our Capital and subsequently closing the doors of this 54 year old ~~Ag~~ landing organization.
We do not relish the idea of legislating away our rights of recovery any more than ~~them~~ the trial lawyers do, but it would be little consolation if we are already put out of business at the expense of making some other party rich.

Good Faith and fair dealings is still a must to successful business, Just as a contract must be a believable and True negotiated business tool. We must daily re-evaluate the risk and rational for adding any new Ag. loans in this environment, and yet we are flooded with calls each week. The same concerns have restricted our borrowing ability as a corporation, which further restricts our current business.

I urge your support of H.B. 592

Tim H. Gill

SENATE JUDICIARY
EXHIBIT NO. Ex 15
DATE March 18, 1987
BILL NO. HB 592

March 18, 1987

TESTIMONY IN SUPPORT OF HB592

Mr. Chairman and Members of the Committee:

My name is Kay Foster. I appear in support of HB592 on behalf of the Governor's Council on Economic Development as well as the Billings Area Chamber of Commerce.

In its report published in January of 1987 the Governor's Council made six specific recommendations in the area of tort reform legislation. The first of these was a request that "the Legislature address the issue of bad faith as it pertains to insurance claims, wrongful discharge and the lending policies of financial institutions."

The Council found that in all of these areas the current practice allows Montana juries a great deal of flexibility in making "bad faith" determinations and our codes must be revised to ensure a fair and equitable civil justice system for all Montanans.

The overall goal of the Governor's Council was to present administrative and legislative action that would encourage economic growth for all doing business in Montana. The passage of HB592 is an important step toward that goal through the restoration of some certainty and predictability to employers, lenders and insurors in our state. We urge its approval.

Montana Retail Association

Executive Office
318 N. Last Chance Gulch
P.O. Box 440
Helena, MT 59624
Phone (406) 442-3388

SENATE JUDICIARY
EXHIBIT NO. Ex 16
DATE March 18, 1987
BILL NO. HB 592

March 17, 1987

Senator Joe Mazurek
Chairman, Judiciary Committee
Capitol Station
Helena, Montana 59620

Dear Senator Mazurek,

Due to a conflict of scheduling, I will be unable to attend your committee hearing that will deal with HB 592 (the bad faith bill). The Montana Retail Association, on behalf of the Montana Hardware & Implement Association, would like to go on record as OPPOSING HB 592. We are concerned for the small businessman and especially anyone who has a franchise agreement.

I understand there is to be some amendments presented. However, we feel they do not go far enough in giving the small businessman some protection.

Thank you for your consideration.

Respectfully,

George E Allen

George Allen
Executive Vice President
Montana Hardware & Implement Association

GA/ch

NAME Jo Brunner DATE 3/18/87

ADDRESS 2015½ BILL NO. HB592

REPRESENT Montana Grange

SUPPORT _____ AMEND _____ OPPOSE X

SENATE JUDICIARY
EXHIBIT NO. 17
DATE March 18, 1987
BILL NO. HB 592

MR. CHAIRMAN:

My name is Jo Brunner and I re present the Montana Grange ~~at this hearing~~ today.
The Montana Grange wishes to go on record as being opposed to HB592.

Despite all the whereases in this bill explaining just what problems apparently exist with the present way of entering into agreements on the premises of good faith, it is our position that we need all the help we can get, even though it would be reinforced ~~in~~ legally other laws and st andards, simply because of the trend in many of our dealings is to not act in good faith, often on both sides of a contract.
We are certainly not legal minds in each and every matter, but we find it difficult to believe that having a good faith clause brings on the great number of law suits indicated in this bill.
We ask that you do not pass HB592

Mr. Chairman, on a personal note, I have had more calls on this one bill than any other bill this session, and that is saying a great deal. From farmers and those involved in businesses alike, I have heard the concern that this will eliminate that which themajority of our people hold dear ~~the~~ unnecessary belief that we all must act in good faith when we deal with others. Although they donot appreciate the fact that we must have laws to enforce that old fashioned position of dealing with your fellow-man, they do not want it eliminated from the laws, even if that is the only way it can come about in this day and age. I ask that you donot pass HB 592. I recieved ~~-~~ Example of calls. And one thought precalls from the calls

MR CHAIRMAN - I wonder how many times your Committee has heard the statement that certain portions ~~of~~ Laws have to deleted, added to, or amended - OR the banks - and other businesses will no longer be able to work with those who borrow - specifically with agriculture - yet no guarantees are given - not even promises - not even

111 Situations That Should All These Various
Concessions be given - That our Borrowing
Ability - our Insurance Ability will improve -

H.B. 592

Loaning Worthless Money

Loaning officers looked at the exorbitant interest rate when making loans which were very profitable. They encouraged all borrowers to borrow without looking at the cash flow of loan.

The bottom line of all this is, Bankers & loan co. loaned worthless money, under conditions of ~~other loans~~ with high interest rate the borrower fails foreclosure and the banks end up with an asset.

Richard Pancheri
B.P.O.E.
Lincoln, MT

SENATE JUDICIARY
EXHIBIT NO. 18
DATE 3-18-87
BILL NO. H.B. 592

SENATE JUDICIARY
EXHIBIT NO. 18A
DATE March 18, 1987
BILL NO. HB 592

A POSITION PAPER IN OPPOSITION TO
HOUSE BILL #592
by Tom L. Lewis

House Bill #592 violates the public interest by promoting rather than curbing abusive and unethical business practices. The Bill mistates the law relating to common law causes of action for breach of the implied convenant of good faith and fair dealing in that it suggests that all contract breaches are actionable in tort for bad faith. The Montana Supreme Court has specifically declined "to extend the breach of implied convenant to all contract breaches." Nicholas v. United Pacific Insurance Co., 42 St.Rptr. 1822. If the legislature were to enact HB592 the citizens of this state would be badly served by their elected representatives, because the act specifically encourages unethical and unreasonable business conduct.

The Montana Supreme Court has held that the bad faith breach of contract is actionable only when there is a "special relationship" that exists between the parties to a contract or when there is a knowing and unreasonable breach of the contract that exceeds the justifiable expectations of the injured party. The Court has properly reserved the application of tort damages into those cases where the conduct of the breaching party is especially harsh, unjustifiable, capricious and beyond all reasonable expectations of the injured party. The Court has primarily limited the application and availability of this common law cause of action to those cases where there is a special relationship between the parties arising out of an inherently unequal bargaining position at the time of both formation of the contract and enforcement of contract provisions.

The Court has found an implied convenant of good faith in adhesion contracts where one party to the contract is in a vastly inferior bargaining position at the time of formation of the contract. In those cases where powerful financial institutions are in a position to dictate to parties with whom such institutions contract (e.g. contracts between bank/customer, security broker/client, surety/principle, insurer/insured), the inferior party has no real say in the language of the written contract and often does not even see the contract until after the commercial relationship has come into existence. The public interest is therefore well served by a requirement of good faith and fair dealing actionable in tort, when the party in a superior position acts with particular harshness and unreasonableness concerning of the other party's rights arising from the commercial transaction, the insurance policy, or other contractual relationship existing between the parties.

In these kinds of legal relationships, common law actions for bad faith well serve the public, because that is the only way to take the profitability out of intentional and unreasonable contract breaches by parties in a superior financial or bargaining position. For example, if an insurer intentionally, arbitrarily and unreasonably withheld health insurance benefits from its insured and forced that insured into bankruptcy or other form of economic distress due to refusal to pay for extraordinary medical expense, HB592 would prevent the insured from ever being made whole. All the insurance company would be required to pay at the conclusion of a long court fight would be what the insurer should have paid to begin with. What incentive would there by for any insurer to deal fairly and in good faith with the insured, when all the insurer would ever have to pay would be what the insurer should have paid before the insured sought counsel and incurred substantial legal fees. What if the insured lost home, property and life savings, because he or she were unreasonably denied coverage by the carrier? Would the public policy and public interest of the citizens of this state be served by this bill which would allow the insurer to escape any liability for consequential damages resulting to the insured and his or loved ones?

The Montana Supreme Court has correctly ruled that in contracts involving inherently unequal bargaining positions and in cases of special relationship between the parties to a commercial transaction, there is an implied-in-law duty of good faith and fair dealing actionable in our civil courts. Every member of the legislature should read the well reasoned decisions of the Supreme Court, which clearly justify this legal principle. The legal relationships where this duty has been found include: Insurer/insured (First Security Bank v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979); Gibson v. Western First Ins., 682 P.2d 725, 41 St.Rptr. 1048 (1984); Lipinski v. Title Ins. Co., 655 P.2d 970 (1982). Bank/customer (First National Bank of Libby v. Twombly 689 P.2d 1226 (Mont. 1984); Tribby v. Northwestern Bank of Great Falls, 704 P.2d 409 (Mont. 1985). Attorney/client (Morse v. Espeland, 696 P.2d 428 (Mont. 1985).

House Bill 592 would be a giant and unfortunate step backward by the law makers of this State. The Supreme Court has proceeded cautiously and has only approved or upheld verdicts based upon bad faith when such verdicts or judgments are well founded by the evidence. If justice is to be sacrificed for certainty and predictability, then the

SENATE JUDICIARY
EXHIBIT NO. 18A
DATE 3-18-87
BILL NO. H.B. 592

citizens of this State will suffer. Powerful contracting parties and powerful litigants will therefore be permitted to intentionally violate their contractual obligations regardless of the harshness of the result on the weaker party to the contract. There will be no incentive for the out-of-state holding companies and financial giants to deal fairly with smaller Montana business interests, because the stronger party will only have to pay when it is caught and it will only have to pay what it should have paid according to the limitations the stronger party has written into the contract. The true damages of the victim of bad faith will not even be presented to a court and will go forever uncompensated. There will therefore be a strong and potentially irresistable incentive for powerful institutions to disregard their contractual/commercial obligations, because it will be less expensive and more profitable to violate the terms of the commercial relationship regardless of how disasterous the consequences are for the disadvantaged party.

HB592 does not promote the legitmate business interests of the State of Montana; it promotes and protects improper and unethical business practices in violation of the interests of all citizens of this State.

SENATE JUDICIARY
EXHIBIT NO. 18A
DATE 3-18-87
BILL NO. H.B. 592

DATE March 18

COMMITTEE ON Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
ED. R REUE	NORTHERN LIVE LAWYERS	592		✓
Charlotte Marshall	WIFE	592		✓
Tim Gill	Montana Livestock Ag. Credit	592	✓	
CLIFF EDWARDS	Self & Clients	592		✓
Terry Murphy	Montana Farmers Union			✓
Jim Robischon	Mont. Liability Coalition	592	✓	
BILL PARKER	FIRST INTERSTATE BANK (GREAT FALLS)	592	✓	
Ben Everett	Self + clients	592		✓
Kay Foster	Gov. Council on Ec. Dev. & Bigs Chamber	592	✓	
Bryan Enderle	Missoula Chamber of Commerce	592	✓	
Cliff Erdmann	MT Savings & Loan	592	✓	
Mary Westwood	Montana Sulphur & Chemical	592		✓
John Crowley	Small Bus Admin	592	X	
Mikki Gove	self	592		✓
FRED FLANDERS	DEPT OF COMMERCE	592	✓	
Joseph Moore	Montana Peoples Action	592		✓
Bob Conger	Bozeman Chamber of Com	592 (344)	✓	
Stacy Doggett	MT Chamber of Commerce	592	✓	
[illegible] Brenner	[illegible]	592		✓
Bob Pyfer	MT Credit Unions League	592	✓	
John Maynard	Tort Claims / Admin.	592		
Robert Johnson	NFIB	592	✓	
Roger Tippy	Mont Dental Assn	344	✓	
Gary Spratt	HD 84	592		✓
Jim Robischon	Mont. Liability Coalition	344	✓	
John Paulsby	MT Bankers Assn	592	✓	

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
CHAD SMITH	Mont Hosp Assn	HB 344	X w/amendments	
Brian Ellis	Mt. Medical Assn	HB44	X	
Roger Micklon	Independents Ins. Agents Assoc. of MT	HB592	X	
Don Dellinger	Mont Bldg Mtrl Assn	HB592	X	
Bob Baucus	MT Self	HB592	X	
Monte Beck	self	HB592		X
BILL ROSSBACH	MTRA	592		X
" "	"	344	X	
Meg Nelson for Sue Olsen	Mountainland Agricultural Alliance	HB592		X

(Please leave prepared statement with Secretary.)

NAME: MARY E WESTWOOD, ATTORNEY DATE: 3/18/87

ADDRESS: P.O. BOX 31118, BILLINGS, MT 59103-1118

PHONE: 252-9324, 248-4207

REPRESENTING WHOM? MONTANA SULPHUR + CHEMICAL CO.

APPEARING ON WHICH PROPOSAL: House Bill 592

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: As an attorney for a small business, I am very concerned about the abolishment of the covenant of good faith and fair dealing implied in all contracts in Montana. Small businesses, as well as individual consumers, can easily fall prey to the superior economic power of larger companies. In our own case, we found ourselves in a "deal" with a Cudahy oil company on some mining property and it was only through the covenant of implied good faith that we were able to pursue damages and defend our property.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Any Montana business which intends to deal fairly with consumers and with other commercial citizens should have no problem with a legal rule that they will deal in good faith. I

~~the~~ way business was done in Montana, and I don't see why that should change in ~~the~~ current fever over ~~tort~~ reform.

NAME: Mollie Neal DATE: 3-18-87

ADDRESS: Box 551 Livingston Montana 59047

PHONE: 406-244-5293

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: ~~SB~~ HB 592

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: My husband & I took over a small museum upon the death of our son - we invested all our income and savings in the museum only to have a very large dirt & tile corp come in and ~~[illegible]~~ mine and destroy our income & devastate it & don't be surprised to return from a rainy hunting day and find your home destroyed by flood waters.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 24, 1987

The fifty-first meeting of the Senate Judiciary Committee was called to order at 7:00 p.m. on March 24, 1987 by Chairman Joe Mazurek in Room 402 of the Capitol Building.

ROLL CALL: All members were present.

ACTION ON HB 442: Valencia Lane explained the amendments that the committee asked her to prepare (see Exhibit 1). She stated amendments 2 through 7 discussed who will make the judgement and the amount entitled to the claimant. She commented the jury will return the verdict and the amount, which the judge is given to review and either accept or not accept. The judge must give his reasons for his decision on the claim amount, she said. Senator Mazurek commented there was a proposed amendment that allowed punitive damages to be put in front of the jury. Senator Pinsoneault agreed that the jury makes the decision on the determining amount, the judge reviews it. Senator Mazurek asked why on page 5, line 22, the amendments have the judge making the decision on punitive damage. Valencia explained on line 25, page 5, it refers to judge trials and the list of factors starts on page 3, line 1. Senator Brown asked isn't it the jury who gives the verdict in criminal cases and the judge gives the sentencing. He felt that system should be used here and have the judge give an amount of the claim and not the jury. Senator Pinsoneault said a judge does give a criminal sentencing, but with what the committee has done by making him just decide on whether the jury's amount is proper has taken some of the burden off his shoulders. Senator Mazurek asked the committee if they wanted every punitive damage award based on this criteria. Senator Mazurek explained there are two areas the committee must decide on: 1) who decides the amount, and 2) should there be punitive damage insurance. Senator Brown commented that he agreed with Representative Mercer that a punitive damage law suit should get at the person it is directed toward and not an insurance company, but it is hard to exclude it from all the other coverages. Valencia stated amendments 1, 8, and 9 strike the language prohibiting insurance coverage of punitive damages. Mr. Jim Robischon said if the committee strikes punitive damages, then his Liability Coalition would propose to allow insurance for punitive damages in some cases. He stated it would have to be an "express rider" clause, so it would not effect each policy. Senator Crippen moved amendments 1, 8, and 9 striking the provision against insurance coverage of punitivie damages. The motion carried.

Senator Crippen moved Jim Robischon's amendment (see Exhibit 2) for discussion. The committee asked why the bill needed this amendment, which allowed punitive damage insurance to continue in policies that

as the duties and obligations were sufficient. Senator Galt moved the Robischon amendments. Senator Mazurek said one can get punitive damages, but not for emotional distress or bad faith cases. Valencia said that was correct. Mr. Robischon added that the House committee felt emotional distress should be kept in tort cases. Senator Yellowtail felt this was an expansion of the bill into the bad faith area and he did not think that it was right. Senator Crippen said he doesn't want to eliminate bad faith. Senator Yellowtail asked if the word "duty" doesn't imply "bad faith". Senator Mazurek stated that has been argued in front of the Supreme Court before. Mr. Englund believed if one has a breach of contract case, unless one has a physical injury, one should not get emotional distress compensation and he said his amendment doesn't deal with punitive damages. Senator Crippen asked Mr. Englund if he would ask the court in his cases for emotional distress. Mr. Englund answered not in contract cases. Senator Halligan moved a substitute motion to leave it the way it is. Senator Mazurek asked the committee if they could move on to HB 592 for the moment. The committee agreed. All motions were withdrawn.

ACTION ON HB 592: Mr. Robischon explained his substitute bill for HB 592 (see Exhibit 5). Mr. Robischon explained the House passed HB 167 and HB 442, which has the same concept as section 1 of his substitute bill, and because of the changes so far in HB 442 and HB 167 it should be put in this bill. He explained in the House's bill it attracts all claims. He stated his section 2 modifies the House's action, because it gets rid of non-negotiable contracts. He explained section 3 is the definition the committee requested. He said it is from the Uniform Commercial Code in the Sales part of the code. He felt it provides for the existence of the claim. Senate Mazurek expressed question on these suggestions because the committee only asked for a definition of "good faith". Mr. Robischon said that because of the action taken tonight, section 1 should be in there and section 2 is an attempt to convince the committee that a party might breach a contract because it was allowed in a statute of the contract. Senator Yellowtail stated the only reason the committee kept the bill is for a real definition and he did not see it. Senator Yellowtail moved BE NOT CONCURRED IN on the bill. Senator Galt made a substitute motion of passing the Robischon substitute bill. Senator Beck said he did not want to see it thrown out because he had received a lot of mail that wanted it passed out. He commented the banks are in a "Catch 22" position because the farmers can run on the bank, the bank can run on the farmer. He asked where does one draw the line on this. Senator Crippen expressed that Mr. Robischon had a definition but would not tell us. Mr. Robischon replied that he wouldn't have argued section 1, but the committee changed HB 442 and HB 167. He said he gave the only definition he had. He stated someone has to take responsibility of this issue before the jury does and section 3 is what the committee is looking for. Karl Englund stated section 1 is only for contract damages and section 2 is only limiting the amount of damages.

Karl Englund agreed with section 3 because it is in the sales code. Senator Mazurek asked when does a "convenant arise". Mr. Robischon said section 2 doesn't do what Mr. Englund said it does. He said it would be any contract that has failed to act, has no implied covenant. Senator Pinsoneault expressed that he doesn't know anyone who has dealt with a bank and has lost something that did not think they got a bad deal. He believed the committee was hearing one side of the story and he felt people will get lawyers to take them to court and use Rule 11, which doesn't work. He stated Robischon's amendment was the best deal. The substitute motion to except the substitute bill failed on a voice vote.

Senator Brown moved a substitute motion to accept just section 2 of the Robischon's bill. Senator Mazurek felt section 2, except for the last four words ("or of such contract") should be included with section 3. Senator Brown added section 2, except for the last four words, to his motion. Mr. Robischon reminded the committee section 2 is the action of the party and not the statute. Senator Brown said he will just go back to his original motion of section 3. Valencia wanted to make clear to the committee that the whole bill is just the definition of "good faith". The motion carried with Senator Galt voting no.

Senator Brown moved a substitute motion of AS AMENDED BE CONCURRED IN on HB 592. Senator Yellowtail felt it still did not do what it was suppose to. The motion carried with Senator Yellowtail voting no.

The committee continued action on HB 167. Senator Crippen moved to reconsider the action to put in an effective date in the bill. The motion to reconsider carried.

Senator Crippen moved the bill. The motion carried (see ROLL CALL Sheet).

ACTION ON HB 241: Senator Pinsoneault commented that the committee had three good meetings on HB 241. He gave the committee the rationales of the Ad Hoc's amendments presented on March 10 (see Exhibit 6) and Barry Hjort's revised amendments presented on March 20 to the subcommittee (see Exhibit 7). He also gave the committee copies of the minutes from the final subcommittee meeting on March 21 (see Exhibit 8). He explained that both sides agreed on amendments 1 through 6 from the Spaeth/Hjort amendments. Senator Pinsoneault moved the first six amendments. The motion carried.

Senator Mazurek asked what the "employer's discretion" meant. Senator Pinsoneault commented on the #3 amendment from the Ad Hoc rationale (see Exhibit 9 and 10, March 10th) about employer's decisions. Senator Bishop asked if they want to cut back on employers discretion or what. Barry Hjort replied there should be the assumption that the decision the

ROLL CALL

Judiciary COMMITTEE

50th LEGISLATIVE SESSION -- 1987 Date March 24 7:00 pm.

NAME	PRESENT	ABSENT	EXCUSED
Senator Joe Mazurek, Chairman	X		
Senator Bruce Crippen, Vice Chairman	X		
Senator Tom Beck	X		
Senator Al Bishop	X		
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Jack Galt	X		
Senator Mike Halligan	X		
Senator Dick Pinsoneault	X		
Senator Bill Yellowtail	X		

Each day attach to minutes.

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date March 24, 1987 Bill No. HB 167 Time 8:20 p.m.

NAME	YES	NO
Senator Joe Mazurek, Chairman		X
Senator Bruce Crippen, Vice Chairman		X
*Senator Tom Beck		X
Senator Al Bishop	X	
Senator Chet Blaylock	X	
Senator Bob Brown	X	
Senator Jack Galt	X	
Senator Mike Halligan	X	
Senator Dick Pinsoneault	X	
Senator Bill Yellowtail	X	

Mary J. Huber
Secretary

Senator Joe Mazurek
Chairman

Motion: AND AS AMENDED, BE CONCURRED IN. The motion carries.

SENATE JUDICIARY
EXHIBIT NO. 5
DATE March 24, 1987
BILL NO. HB 592 7:00pm

SUBSTITUTE HB 592

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT, UNLESS OTHERWISE PROVIDED IN STATUTE, DAMAGES FOR BAD FAITH AND BREACH OR TORTIOUS VIOLATION OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARE LIMITED TO THE MEASURE OF CONTRACT DAMAGES; PROVIDING THAT A PARTY MAY NOT BE FOUND TO HAVE BREACHED THE COVENANT IF ITS ACTION WAS BASED UPON A STATUTORY OR CONTRACTUAL RIGHT; DEFINING GOOD FAITH CONDUCT; AND PROVIDING AN APPLICABILITY DATE AND AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA.

Section 1. Damages. Unless otherwise expressly provided by statute, damages for breach or tortious violation of an implied covenant of good faith and fair dealing shall be limited to the measure of damages for breach of contract.

Section 2. When covenant applicable. An action for breach or tortious violation of an implied covenant of good faith and fair dealing included within or arising out of a contract may not be maintained against a party whose act or failure to act is permitted by any provision of statute or of such contract.

Section 3. Definition. The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

Section 4. Applicability. This act applies to causes of action arising after the effective date of this act.

Section 5. Effective date. This act is effective July 1, 1987.

STANDING COMMITTEE REPORT

SENATE

SCRHB592

March 26, 19 87

MR. PRESIDENT

We, your committee on Judiciary

having had under consideration House Bill No. 592

third reading copy (blue color)

ABOLISH BAD FAITH & BREACH OF COVENANT OF GOOD FAITH & FAIR DEALING ACTIONS

Respectfully report as follows: That House Bill No. 592

BE AMENDED AS FOLLOWS:

1. Title, lines 4 and 5.
Following: " "AN ACT" on line 4
Strike: remainder of line 4 through "BREACH OF" on line 5
Insert: "ESTABLISHING THE CONDUCT REQUIRED BY"

2. Title, lines 6 and 7.
Following: "DEALING" on line 6
Strike: remainder of line 6 through "STATUTE" on line 7

3. Page 1, line 10 through page 2, line 23.
Strike: lines 10, page 1 through line 23, page 2 in their entirety

4. Page 3, lines 1 through 8.
Following: "1." on line 1
Strike: remainder of section 1 in its entirety
Insert: "Implied covenant of good faith and fair dealing. The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

~~XXXXXXXXX~~

~~XXXXXXXXXXXXXXX~~ AND AS AMENDED
BE CONCURRED IN

3-26-87 pg 10:10

Chairman.

Senator Mazurek

HOUSE BILL NO. 592

INTRODUCED BY HARP

A BILL FOR AN ACT ENTITLED: "AN ACT ~~PROVIDING--THAT COMMON-LAW--CAUSES--OF--ACTION--FOR--BAD-FAITH-AND-BREACH-OF~~ ESTABLISHING THE CONDUCT REQUIRED BY THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ~~EXIST--ONLY--WHEN--EXPRESSLY PROVIDED-BY-STATUTE~~; AND PROVIDING AN APPLICABILITY DATE AND AN ~~IMMEDIATE~~ EFFECTIVE DATE."

~~WHEREAS, the existing law of contracts provides a legal remedy for the recovery of damages resulting from a breach of contract; and~~

~~WHEREAS, the Uniform Commercial Code governs commercial transactions, including those involving financial institutions, and requires that parties to a contract deal with one another in "good faith"; and~~

~~WHEREAS, the provisions of Title 33, chapter 8, relating to insurance unfair claims settlement practices, establish standards of good faith and fair dealing between insurance carriers and their insureds; and~~

~~WHEREAS, the legislature has the opportunity to provide standards to govern other legal relationships, such as the employment relationship; and~~

~~WHEREAS, the Montana Supreme Court has held that a covenant of good faith and fair dealing is implied in every contract and is violated when a party's actions are arbitrary or capricious or violate the reasonable expectations of the other party; and~~

~~WHEREAS, no clear standards exist to guide the actions and decisions of a party to a commercial contract, yet violation of the implied covenant may subject a party to compensatory and punitive damages; and~~

~~WHEREAS, this newly created doctrine has introduced tremendous uncertainty and unpredictability into commercial relationships; and~~

~~WHEREAS, this uncertainty and unpredictability frustrates parties who might otherwise enter mutually beneficial commercial transactions; and~~

~~WHEREAS, this uncertainty and unpredictability has resulted in extensive litigation at substantial cost; and~~

~~WHEREAS, it is the opinion of the legislature that clearly articulated standards, certainty, and predictability must be restored to the law of contracts; and~~

~~WHEREAS, certainty and predictability will be restored if the traditional law of contracts, consisting of longstanding statutes and judicially created doctrines, is substituted for the vagaries of the implied covenant of good faith and fair dealing,~~

REFERENCE BILL

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. ~~Cause-of-action-for-bad-faith-or-breach--of implied--covenant--of--good--faith--and-fair-dealing----when allowed.--Common-law-civil-causes-of-action-for-the-torts-of "bad-faith"-and-"breach-of--the--implied--covenant--of--good faith--and--fair--dealing"-are-permitted-only-when-expressly authorized-by-statute.~~ ~~NOTHING-IN-THIS-SECTION--AFFECTS--THE RIGHTS--OF--ANY--PERSON--TO--BRING-AN-ACTION-AS-PERMITTED-BY 33-18-201-OR-THE-UNIFORM-COMMERCIAL-CODE.~~ IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING. THE CONDUCT REQUIRED BY THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IS HONESTY IN FACT AND THE OBSERVANCE OF REASONABLE COMMERCIAL STANDARDS OF FAIR DEALING IN THE TRADE.

Section 2. Applicability. This act applies to causes of action arising after the effective date of this act.

Section 3. Effective date. This act is effective on ~~passage-and-approval~~ JULY 1, 1987.

-End-